(12) (12)

No. 04-277 and 04-281

Supreme Court, U.S.
FILED
JAN 18 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents,

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
DAVID PRICE *
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 588-0302

* Counsel of Record

January 18, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 2

The Broadband Market Is Highly Competitive, Rendering Unnecessary "Common Carrier" Obligations Such As Those Mandated Under the Ninth Circuit's Decision 2

CONCLUSION 6

TABLE OF AUTHORITIES

Pages

CASES

United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002) 3

ADMINISTRATIVE MATERIALS

Complaint, *America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989 (FTC filed Dec. 14, 2000) 3

Dep't of Justice, Antitrust Division, Competitive Impact Statement, *United States v. AT&T Corp. and MediaOne Group, Inc.*, No. 00-1176 (D.D.C. filed May 25, 2000) 3

MediaOne Group, Inc. and AT&T Corp., 15 F.C.C.R. 9816 (2000) 3

Rulemaking to Amend Parts 1, 2, 21, and 25, 15 F.C.C.R. 11857 (2000) 3

Time Warner Inc. and America Online, Inc., 16 F.C.C.R. 6547 (2001) 3

ARTICLES

Broadband Beams From the WildBlue Yonder, Broadband Business Forecast, Aug. 10, 2004 4

Cable Executives Gear Up for Bigger Competitive Onslaught, Communications Daily, Jan. 14, 2005 2

Cable Has to Like 'Brand X' Chances, Multichannel News, Jan. 3, 2005, at 8 2

Karen George, *Betting on Broadband*, Public Utilities Fortnightly, Jan. 2005, at 52 4

James S. Granelli, *Network With No Strings Attached*, Los Angeles Times, Aug. 30, 2004, at C1 4

Reinhardt Krause, *Cable TV Companies Take Back Spotlight In Broadband Battle*, Investor's Business Daily, Oct. 29, 2004, at A5 3

North American DSL Growth Finally Beats Cable Broadband, Broadband Business Forecast, Aug. 24, 2004 3

Jube Shiver Jr., *Broadband Market Is About to Heat Up*, June 17, 2004, at C1 2

OTHER AUTHORITIES

Congressional Budget Office, *Does the Residential Broadband Market Need Fixing?* (2003) 3

Transcript of EarthLink Q3 2004 Earnings Call, Oct. 21, 2004 4

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this and other federal courts to address the proper scope of the telecommunications laws and other federal laws as they apply to the telecommunications industry and the Internet. *See, e.g.*, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster* (No. 04-480) (supporting petition for certiorari); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). WLF's Legal Studies Division also publishes policy papers educating policymakers and practitioners regarding these subjects. *See, e.g.*, Kristen J. Mathews, *Understanding and Complying With The "CAN-SPAM" Act* (2004); Prof. Richard A. Epstein, *"Digital Rights Management" Best Left To Private Contract* (2002); Steven G. Bradbury and Grant M. Nixon, *Court Ruling Wrongly Creates New Right To Sue Telecom Companies* (2002). WLF is concerned that the decision below, if not reversed, will stifle the FCC's efforts to reconsider burdensome "common carrier" regulations with respect to Internet broadband providers.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

Respondents have lodged a blanket letter of consent to *amicus* briefs with the Clerk of the Court. Letters from Petitioners consenting to the filing of this brief have also been lodged with the Clerk.

ARGUMENT

The Broadband Market Is Highly Competitive, Rendering Unnecessary "Common Carrier" Obligations Such As Those Mandated Under the Ninth Circuit's Decision

Respondents Brand X Internet Services and Center for Digital Democracy (CDD) raise the specter of high concentration in the broadband market. Opp. at 2 & n.14. CDD has elsewhere maintained that if the Ninth Circuit's decision is reversed, and cable broadband providers are not required to serve as common carriers to other Internet Service Providers (ISP's), then "cable companies will be able to block content at will for political and financial reasons and deny the public the ability to choose among competing Internet providers." *Cable Has to Like 'Brand X' Chances*, Multichannel News, Jan. 3, 2005, at 8.

The resolution of this policy argument is properly the province of the Federal Communications Commission, not the federal courts. It may be of benefit to this Court, however, to be aware of the broader economic context of this case, and in particular, of the facts that render CDD's policy arguments groundless.

The reality is that cable companies (providers of cable modem service) and phone companies (providers of DSL service) are locked in an intense competition for residential broadband subscribers. Jube Shiver Jr., *Broadband Market Is About to Heat Up*, June 17, 2004, at C1. *See also Cable Executives Gear Up for Bigger Competitive Onslaught*, Communications Daily, Jan. 14, 2005 ("cable executives are running scared these days").

As of June 30, 2004, roughly 60% of households with broadband used cable modem. Local telephone companies have been responding with substantial price cuts for their existing

Digital Subscriber Line ("DSL") service and are making major capital investments in fiber-optic transmission facilities. Reinhardt Krause, *Cable TV Companies Take Back Spotlight In Broadband Battle*, Investor's Business Daily, Oct. 29, 2004, at A5. The Congressional Budget Office noted a little over a year ago that recent indications pointed to robust competition among providers, including price cuts among DSL providers from $45 or $50 a month to $35 a month or even less. Congressional Budget Office, *Does the Residential Broadband Market Need Fixing?* 22-23 (2003). Today, the greatest growth in new broadband subscribers is in DSL, not cable modem. *North American DSL Growth Finally Beats Cable Broadband*, Broadband Business Forecast, Aug. 24, 2004.

Indeed, the Department of Justice and the FCC have each found that the broadband market is marked by vigorous competition among existing providers, with a growing number of new entrants likely.[2]

Another source of competition in the broadband marketplace is ISP's who lack their own delivery "pipes" into households, but who contract with other providers in a wholesaler-retailer arrangement. Such arrangements provide incremental revenue to the provider (a cable company or phone company) and open up a market to the ISP.

---

[2] *See, e.g., Time Warner Inc. and America Online, Inc.*, 16 F.C.C.R. 6547, 6571-74 (¶¶ 63-67) (2001); Complaint ¶ 21, *America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989 (FTC filed Dec. 14, 2000), *available at* www.ftc.gov/os/2000/12/aol_complaint.pdf; *Rulemaking to Amend Parts 1, 2, 21, and 25*, 15 F.C.C.R. 11857, 11865 (19) (2000) (explaining that "no group of firms or technology will likely be able to dominate the provision of broadband services"); *MediaOne Group, Inc. and AT&T Corp.*, 15 F.C.C.R. 9816, 9866 (116) (2000) (finding that cable faces "significant actual and potential competition from ... alternative broadband providers"); Dep't of Justice, Antitrust Division, Competitive Impact Statement, *United States v. AT&T Corp. and MediaOne Group, Inc.*, No. 00-1176, at 7-8 (D.D.C. filed May 25, 2000), *available at* www.usdoj.gov/atr/cases/f4800/4842.htm. *See also United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) ("robust competition" exists "in the broadband market").

Still further competition is on the horizon from other technologies for broadband delivery. Respondents acknowledge as much. Opp. at 2. Wide-area wireless networks, which allow subscribers to obtain broadband services via radio spectrum, are becoming available. James S. Granelli, *Network With No Strings Attached*, Los Angeles Times, Aug. 30, 2004, at C1. "Although fiber-optic cable is considered the ultimate high-speed connection – Verizon Communications Inc. is investing $2.5 billion to wire 3 million homes in two years – wireless broadband technology is advancing at such a torrid pace that it could match hard-wired cable and DSL in popularity." *Id.*

Another competing technology is broadband-over-powerline (BPL) delivery, which has been implemented in Cincinnati and in Manassas, Virginia. This technology, as the name suggests, enables delivery of broadband ervices over residential electrical lines, and creates the opportunity for local electric utilities to enter the broadband market, either alone or with an ISP partner. Karen George, *Betting on Broadband*, Public Utilities Fortnightly, Jan. 2005, at 52. Indeed, Respondent EarthLink has publicly stated that it owns a minority interest in one provider of BPL technology and has carried out trials with two others. Transcript of EarthLink Q3 2004 Earnings Call, Oct. 21, 2004, at 9 (analyst Q&A transcribed by CallStreet.com).

In addition, residential delivery of broadband services via Ka-band satellite is expected to become commercially available this year. One such venture is backed by a half-billion dollar investment from the National Rural Telecommunications Cooperative (NRTC), Liberty Media, Intelset, Arianespace, and the venture capital firm Kleiner Perkins Caufield & Byers. *$50 Broadband Beams From the WildBlue Yonder*, Broadband Business Forecast, Aug. 10, 2004.

The point is not that any one of these technologies will necessarily supplant cable modem and DSL. At a minimum, however, the commercial availability of these technologies

serves as a brake against overreaching by the cable companies and phone companies in the marketplace. If cable modem and DSL providers try to overreach in some fashion, these alternate technologies will become correspondingly more attractive to consumers. Any broadband provider that attempts to deny consumers the content they desire will find itself on the losing end of the competitive battle. It is this normal operation of competitive forces, not command-and-control common carrier requirements, that the FCC has properly determined should apply in the broadband marketplace.

From the perspective of consumers, the regulatory successes of recent years have occurred where the FCC encouraged capital investment and market entry by imposing minimal regulation and by creating a level playing field for all technologies and providers. The explosive growth of wireless telephone communications, the growth of the Internet itself, and the new competition in long-distance services have all been nurtured by a "hands off" deregulatory approach. "Common carrier" regulations, such as those now applied to DSL and those that would apply to cable modem under the Ninth Circuit's ruling, disserve consumers by stifling new capital investment and new entry into the market. The FCC should thus be allowed to complete its work and create a uniform regime of minimal regulation for all broadband providers.

CONCLUSION

For the foregoing reasons, and for the reasons stated by the Government, the private Petitioners, and the DSL providers (Verizon, Bellsouth, and SBC), the Court should reverse the decision below.

Respectfully submitted,

Daniel J. Popeo
David Price
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 588-0302

January 18, 2005